Supreme Court, U.S.
FILE D

931206 JAN 21 1994

OFFICE OF THE CLERK

(1)

NO. _____

In The
SUPREME COURT OF THE UNITED STATES OF AMERICA
October Term, 1993

BEXAR COUNTY APPRAISAL REVIEW BOARD
and BEXAR COUNTY APPRAISAL DISTRICT,
PETITIONERS

V.

FIRST BAPTIST CHURCH OF SAN ANTONIO
and VALERO REALTY COMPANY,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS, SAN ANTONIO

PETITION FOR WRIT OF CERTIORARI and APPENDIX, VOLUME I

DENNIS K. DRAKE
Petitioners' Counsel of Record
Lincoln Center, Suite 235
7800 IH 10 West
San Antonio, Texas 78230
(210) 366-9636

57 pp

Questions Presented for Review

Does a state's property tax exemption scheme, as interpreted by its courts, violate the First and Fourteenth Amendments to the United States Constitution when religious organizations are more favorably treated than similarly qualified secular organizations?

Does the judicial application of a state's property tax exemption laws violate the First and Fourteenth Amendments when, in order to qualify for an exemption, the state is required to subjectively determine, on a case by case basis, whether property owned by a religious organization is primarily used for religious worship?

Do the First and Fourteenth Amendments prohibit a state from granting property tax exemptions to churches or other religious organizations that use their property for commercial profit making purposes?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES v
OPINIONS BELOW vii
JURISDICTION viii
CONSTITUTIONAL PROVISIONS & STATUTE ix
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 3
CONCLUSION 9
APPENDICES:
Volume I
Table of Contents and Index of Authorities ..... i a
Fourth Court of Appeals Opinion and
Judgment on Remand (January 20, 1993) 1a
Fourth Court of Appeals, First Opinion
(October 10, 1990) 19a
Texas Supreme Court's Opinion
(Majority and Concurring, pp. 27a-36a)
(June 10, 1992) 27a
Volume II
Table of Contents and Index of Authorities i
Texas Supreme Court's Opinion
(Dissenting Opinion, pp. 37a-45a)
(June 10, 1992) 37a
Texas Supreme Court's Order
(July 17, 1992) 46a
Fourth Court of Appeals, First Opinion on Remand
Withdrawn (November 12, 1992) 48a
Texas Supreme Court's Order on
Writ of Error (June 3, 1993) 52a
Texas Supreme Court's Order on Rehearing
(October 27, 1993) 54a
Trial Court's Final Judgment
(July 17, 1989) 56a

Portions of Petitioners' Second Amended Original Answer (May 12, 1989) 61a
Portions of Petitioners' Motion to Dismiss (May 16, 1989) 64a
Portions of Petitioners' Memorandum of Law (May 22, 1989) 67a
Statement of Facts Excerpts on Petitioners' Motion to Dismiss and Trial Court's Ruling (May 22, 1989) 72a
Trial Court's Order on Petitioners' Motion to Dismiss (May 25, 1989) 78a
Portions of Petitioners' Motion for New Trial (August 14, 1989) 80a
Portions of Statement of Facts on Petitioners' Motion for New Trial (August 22, 1989) 83a
Trial Court's Order Overruling Petitioners' Motion for New Trial (September 11, 1989) 86a
Portions of Petitioners' Fourth Point of Error to Fourth Court of Appeals District of Texas, San Antonio (January 29, 1990) 88a
Portions of Statement of Facts Testimony by Chief Appraiser for Bexar County Appraisal District on Other Similar Church Properties (May 26, 1989) 92a

U.S. Constitutional Provisions

First Amendment 95a
Fourteenth Amendment 95a

Sections of the Texas Tax Code Ann.:

6.01 ..... 96a
11.11(a) and (d) 96a
11.18(a) and (b) 97a
11.181(a) and (c) 97a
11.19(a) and (b) 98a
11.20 ..... 99a
11.21(a) and (b) 101a
11.45(a) 102a
42.21(a) 102a
42.23 ..... 102a

TABLE OF AUTHORITIES

CASES:

Bexar Appraisal District v. Incarnate Word College, 824 S.W.2d 295 (Tex. App. - San Antonio 1992, writ denied) 6

Bexar County Appraisal Review Board v. First Baptist Church, 800 S.W.2d 892 (Tex. App. - San Antonio 1990) ..... vii, 2

Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554 (Tex. App. - San Antonio 1993, writ denied) .... vii, 3, 8

Bullock v. Nat'l Bancshares Corp., 584 S.W.2d 268 (Tex. 1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 667, 62 L.Ed.2d 645 (1980) 6

City of Austin v. University Christian Church, 768 S.W.2d 718 (Tex. 1988)..... 4, 9

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 316 F. Supp. 1116 (S.D. Fla. 1970) 9

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972)..... 9

Everson v. Board of Education, 330 U.S. 1 (1947) 7

First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108 (Tex. 1992)..... ..... vii, 3, 4,.6,.7, 9

Hilltop Village, Inc. v. Kerrville Indep. School Dist., 426 S.W.2d 943 (Tex. 1968)..... 6

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990)..... 9

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 5, 7, 9

River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963)..... 6

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)..... 9

University Christian Church v. City of Austin, 789 S.W.2d 361 (Tex. App. - Austin 1990, no writ) 8

Walz v. Tax Commission, 397 U.S. 664 (1970)..... 3, 9

U.S. CONSTITUTIONAL PROVISIONS

First Amendment ..... i, iv, vii, viii, ix, 1, 2, 3, 9
Fourteenth Amendment ..... i, iv, viii, ix

STATUTES:

28 U.S.C. §1257 viii

TEXAS STATUTES:

Tex. Tax Code Ann. §6.01(c)(Vernon 1992) 1
Tex. Tax Code Ann. §11.11 (Vernon 1992) 5
Tex. Tax Code Ann. §11.18 (Vernon Supp. 1994) 5
Tex. Tax Code Ann. §11.181 (Vernon Supp. 1994) 5
Tex. Tax Code Ann. §11.19 (Vernon 1992) 5
Tex. Tax Code Ann. §11.20 (Vernon 1992) ..... ix, 5, 6
Tex. Tax Code Ann. §11.21 (Vernon 1992) 5
Tex. Tax Code Ann. §11.45 (Vernon 1992) 1, 5
Tex. Tax Code Ann. §42.21 (Vernon 1992) 5
Tex. Tax Code Ann. §42.23 (Vernon 1992) 5

OPINIONS BELOW

The first opinion of the Fourth Court of Appeals District of Texas, San Antonio, reversing the judgment of the State District Court on evidentiary grounds, without deciding the constitutional arguments raised by Petitioners, is reported at Bexar County Appraisal Review Board v. First Baptist Church, 800 S.W.2d 892 (Tex. App. - San Antonio 1990). It is reprinted at App. Vol. I, p. 19a.

The opinion of the Texas Supreme Court denying discretionary review of the Petitioners' First Amendment issue and remanding such issue to the Fourth Court of Appeals for disposition is reported at First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111, 112 & n.4 (Tex. 1992). It is reprinted at App. Vol. I, pp. 27a; 31a, n.4.

The opinion of the Fourth Court of Appeals, overruling Petitioners' First Amendment arguments on remand from the Texas Supreme Court is reported at Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554, 557-559 (Tex. App. - San Antonio 1993, writ denied). It is reprinted at App. Vol. I, pp. 1a; 3a-7a. The original opinion of the Fourth Court of Appeals, on remand, dated November 12, 1992, which was subsequently withdrawn, is not reported. It is reprinted in relevant part at App. Vol. II, p. 48a.

The order of the Texas Supreme Court entered on June 3, 1993, denying discretionary review of the Fourth Court of Appeals decision after remand is unreported. It is reprinted at App. Vol. II, p. 52a.

The order of the Texas Supreme Court, dated October 27, 1993, denying Petitioners' Motion for Rehearing on the First Amendment issue is unreported but is reprinted at App. Vol. II, p. 54a.

The final judgment of the State District Court, rendered July 17, 1989, incorporating the jury's findings is not reported. It is reprinted at App. Vol. II, p. 56a.

JURISDICTION

The Texas Supreme Court denied discretionary review by an Order, dated June 3, 1993, with the notation "Writ Denied." (App. Vol. II, pp. 52a-53a) A timely filed Motion for Rehearing was overruled by the Texas Supreme Court on October 27, 1993. (App. Vol. II, pp. 54a-55a) This Petition is filed within ninety (90) days after entry of that Order. Jurisdiction is invoked pursuant to 28 U.S.C. §1257.

The grounds upon which the jurisdiction of this Court is invoked is that the final ruling of the Texas Supreme Court denying discretionary review is reviewable by Writ of Certiorari where any right set forth is specifically claimed under the Constitution of the United States.

Petitioners claim that the Texas property tax exemption laws, as judicially interpreted by State court decisions, violate the Establishment Clause of the First Amendment to the Constitution, as applied to the States through the Fourteenth Amendment, because exempting church owned property used for a profit-making commercial enterprise constitutes a government subsidy of religion which excludes similarly organized secular organizations. Further, the application and administration of such exemptions results in excessive government entanglement with religion and is not uniformly applied.

The trial court's judgment became final when the Texas Supreme Court denied Petitioner's Motion for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall ... deny any person within its jurisdiction the equal protection of the laws.

TEXAS TAX CODE ANNOTATED SECTION 11.20

Tex. Tax Code Ann. §11.20 provides, in relevant part:

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

> (1) the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship;...

(d) Use of property that qualifies for the exemption prescribed by Subdivision (1) or (2) of Subsection (a) of this section for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

(e) For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

[Full text is reprinted at App. Vol. II, pp.99a, 101a.]

STATEMENT OF THE CASE

This is an appeal from a decision of a Texas Court of Appeals holding that the State's property tax exemption laws do not violate the Establishment of Religion Clause of the First Amendment to the United States Constitution. Such decision affirms the judgment of a State District Court ordering Petitioners to remove from the property tax rolls of Bexar County, Texas, parking lots owned by First Baptist Church which are used by the Church for a profit-making commercial enterprise.

The First Baptist Church of San Antonio is located in downtown San Antonio, Texas. The Church owns four (4) parking lots; two (2) are adjacent to the Church sanctuary, the other two are located nearby the corporate headquarters of Valero Energy Corp.

The Church leases the two parking lots closest to Valero's headquarters to Valero Realty Company ("Valero"), a subsidiary of Valero Energy Corporation. Valero pays the Church over $100,000 per year for the use of these two parking lots.

Under the terms of its Lease Agreements with the Church, Valero has exclusive possession of these two parking lots five (5) days a week between the hours of 7:30 a.m. and 5:00 p.m. Valero permits the Church to use these two lots on business days after 5:00 p.m., Sundays and occasional holidays. The Church actually uses the two leased lots primarily on Sundays. Valero is responsible for all the upkeep and maintenance on the two leased parking lots and is further responsible for the payment of all property taxes over and above the 1979 tax rate. The market value of the two leased parking lots is over $2,000,000.

The Bexar County Appraisal District, a political subdivision of the State, Tex. Tax Code Ann. §6.01(c)(Vernon 1992); (App. Vol. II, p. 96a) is charged with ensuring that tax exemptions are properly granted. Tex. Tax Code Ann. §11.45(a)(Vernon 1992) (App. Vol. II, p. 102a). The District's Chief Appraiser denied the Church its property tax exemptions for

1984-1986 on the two parking lots leased to Valero. The Church protested the Chief Appraiser's decision to the Appraisal Review Board of Bexar County, Texas, which upheld the Chief Appraiser's decision. The Church, later joined by Valero, filed suit in the 225th Judicial District Court of Bexar County, Texas, to force the Bexar Appraisal District to exempt the parking lots from taxation. All other Church property not used for commercial purposes, including the parking lots closest to the sanctuary, are exempt from property taxes.

Before trial on the merits, Petitioners raised their constitutional issues in *Defendants' Second Amended Original Answer* (App. Vol. II, pp. 61a-63a) which was argued before the trial judge prior to trial at a hearing on *Defendants' Motion to Dismiss and Memorandum of Law* in support thereof (App. Vol. II, pp. 64a-66a; pp. 67a-71a). Petitioners' Motion was overruled by the trial judge. (App. Vol. II, pp. 72a-79a) The District's challenge to the constitutionality of the statute was again raised in *Defendants' Motion for New Trial* (App. Vol. II, pp. 80a-82a; 83a-85a) which was overruled by the trial judge (App. Vol. II, pp. 86a-87a).

On January 29, 1990, Petitioners filed their Appellant's Brief with the Fourth Court of Appeals District of Texas, San Antonio, under docket number 04-89-00543-CV, and asserted as their fourth point of error:

> The trial court erred in granting judgment for the Church/Valero because, as a matter of law, the granting of an exemption in this case violates the First Amendment to the United States Constitution...
>
> (App. Vol. II, pp. 88a-91a)

The Fourth Court of Appeals in its first opinion reversed the judgment of the trial court finding that the Church failed to present any evidence establishing the parking lots were used primarily for religious purposes as required by law. (Bexar County

Appraisal Review Board v. First Baptist Church, 800 S.W.2d 892 (Tex. App. - San Antonio 1990). App. Vol. I, pp. 19a-26a). The Texas Supreme Court thereafter granted the Church/Valero's Application for Writ of Error, reversed the decision of the Court of Appeals and remanded Petitioners' federal constitutional question to the Court of Appeals for disposition. (First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111, 112 & n.4 (Tex. 1992); App. Vol. I, pp. 27a-31a, n.4). The Fourth Court of Appeals on remand held that the State's exemption laws do not violate the Establishment Clause of the First Amendment. (Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554, 557-559 (Tex. App. - San Antonio 1993, writ denied); App. Vol. I, pp. 1a, 3a-7a). The District's Motion for Rehearing on this issue was overruled by the Fourth Court of Appeals. (App. Vol. I, pp. 1a; 18a) Petitioners' Application for Writ of Error to the Texas Supreme Court on this point was denied, on the 3rd day of June, 1993, with the notation "Writ Denied". (App. Vol. II, pp. 52a-53a). The District's Motion for Rehearing before the Texas Supreme Court was denied on October 27, 1993. (App. Vol. II, pp. 54a-55a).

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Direct Conflict With The First Amendment Principles Established By The Applicable Decisions Of This Court

In rejecting the District's constitutional arguments brought forward here, the Fourth Court of Appeals misinterprets and misapplies the minimum First Amendment standards set out in Walz v. Tax Commission, 397 U.S. 664 (1970) and its progeny.

Unlike the New York property exemption statute in Walz, which passed constitutional muster, the Texas statutory scheme for granting property tax exemptions violates the Establishment Clause of the First Amendment because:

-As applied by lower state court decisions it requires excessive government entanglement with religion on a "case by case" basis.

-As interpreted by lower state court decisions it is not neutral; it favors religious organizations over secular organizations.

-It results in a government-sponsored subsidy for religion in general and certain churches in particular.

-It is not equal in its application or results.

The Texas Statute Requires Government Intervention In Religious Activities On A "Case By Case" Basis.

The Texas Supreme Court in setting out the evidentiary standard governing the application of the Texas statute in this case and in the case of City of Austin v. University Christian Church, 768 S.W.2d 718 (Tex. 1988), removed any objective standard for measuring the primary use of the property for religious purposes and replaced it with a subjective test. (What does the church use the property for instead of what is the actual use of the property?) This qualitative approach[1] requires each of the State's 254 chief appraisers to first determine whether religious activities meet the State's statutory definition of "religious worship", i.e.:

> For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

Tex. Tax Code Ann. §11.20(e)(Vernon 1992); (Cf. full text, App. Vol. II, pp. 99a-101a). The Chief Appraiser must then examine the motives and purposes of the religious organization's use of its

---

1 First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111 (Tex. 1992), (App. Vol. I, p. 30a).

property to determine whether the property is primarily used for religious worship. Tex. Tax Code Ann. §§11.20(a)(1); 11.45(a), (c) (Vernon 1992); (App. Vol. II, pp. 99a; 102a). If the exemption is denied, the church or religious organization must file an administrative protest with another government entity, the Appraisal Review Board. Ultimately, any religious organization denied an exemption may then file suit in District Court for a trial de novo and have the exemption issue determined by judge or jury. Tex. Tax Code Ann. §§42.21; 42.23(c) (Vernon 1992) (App. Vol. II, p. 102a). This is precisely the type of government supervision criticized in Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) when this court stated:

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

The Texas Statute Is Not Neutral; It Favors Religious Organizations Over Secular Organizations.

The Texas tax exemption scheme as interpreted and applied by lower state court decisions, imposes stricter standards for exempting secular organizations than it does for religious organizations. Secular organizations are entitled to a tax exemption only if the property is used "exclusively" by a qualified organization for its proper purpose (Cf., Tex. Tax Code Ann. §§11.11 (Vernon 1992),[2] 11.18 (Vernon Supp. 1994), 11.19 (Vernon 1992), 11.181 (Vernon Supp. 1994), and 11.21 (Vernon 1992); (App. Vol. II, pp. 96a; 97a; 98a; 97a; 101a.) Property owned by religious organizations is exempted under the much

---

2 Under this section of the Tax Code even State-owned property loses its tax exempt status if its "property is rented or leased for compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the State agency...". Yet, religious property leased under the same circumstances keeps its state sponsored property tax exemption.

more liberal standard of "primary use". The more liberal standard for religious organizations was expressly acknowledged and approved by Justice Cook in the Texas Supreme Court's opinion on the evidentiary question presented in this case when Justice Cook stated in his concurring opinion:

> This liberality is particularly evident in the current statute granting a tax exemption for real property used primarily as a place of regular religious worship. Section 11.20(a)(1) grants the exemption based on *primary use*, not *exclusive use*.

(Court's emphasis, First Bapt., 833 S.W.2d at 112; App. Vol. I, p. 33a). Justice Cook goes on to say that the legislature intended that property used for religious worship be granted exemptions more liberally than property not so used because the legislature "intentionally and carefully" made the distinction between "primary" and "exclusive." Id. at 112; App. Vol. I, p. 33a. This inequality in statutory construction and application of Texas' property tax exemption laws, favoring religious organizations over otherwise qualified secular organizations, is graphically demonstrated in Bexar Appraisal District v. Incarnate Word College, 824 S.W.2d 295, 297 (Tex. App. - San Antonio 1992, writ denied), where the same Fourth Court of Appeals which upheld the exemption for First Baptist denied a college institution an exemption for property used "primarily" as a private residence rather than "exclusively" for educational functions. The Fourth Court of Appeals in support of its decision cited opinions of the Texas Supreme Court calling for "strict construction" of exemption statutes. Id. at 297; Bullock v. Nat'l Bancshares Corp., 584 S.W.2d 268, 271-72 (Tex. 1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 667, 62 L.Ed.2d 645 (1980) (franchise taxes); Hilltop Village, Inc. v. Kerrville Indep. School Dist., 426 S.W.2d 943, 948 (Tex. 1968) (home for the aged not exempt from ad valorem taxation); River Oaks Garden Club v. City of Houston, 370

S.W.2d 851, 855 (Tex. 1963) (because nonprofit organization was not institution of purely public charity, it was not exempt from taxation). Obviously, the Texas courts apply a less strict exemption standard for religious organizations than they do for secular organizations. This standard fails the Lemon test (Lemon, 403 U.S. at 612) requiring that any such statute must have a secular legislative purpose.

The Texas Statute Effectively Constitutes A Government Subsidy For Religion In General And Certain Churches In Particular.

As noted by Justice Mauzy of the Texas Supreme Court in his dissenting opinion in this case:

> ... tax exemptions and preferences constitute indirect public subsidies that are every bit as real as the direct expenditure of public monies.

(First Bapt., 833 S.W.2d at 118; App. Vol. II, p. 45a)

Petitioners would go even further and state that when a State, either administratively or judicially, exempts from taxation church property hired out for commercial profit, it is in fact granting a direct subsidy to religious organizations with no corresponding benefit to like commercial secular enterprises (i.e., other commercial parking lots) which markedly burdens non-exempt property owners.

Moreover, a scheme that allows church property to be utilized for commercial purposes ultimately results in one privileged denomination being subsidized at government expense without equal benefit to other denominations that are either unwilling or unable to utilize their property for non-religious commercial purposes. In Everson v. Board of Education, 330 U.S. 1, 15 (1947) this court said: "Neither a state nor the federal government can ... pass laws which aid one religion, aid all religions, or prefer one religion over another."

The Texas Exemption Statute Is Not Equal In Its Application Or Results.

The case by case qualitative analysis mandated by the Texas Supreme Court requires each of the State's 254 chief appraisers and/or appraisal review boards to make subjective decisions as to which churches or religious organizations qualify for a property tax exemption. This is a standard which leads to an unequal application of the law and results in selective government sponsorship of one church over the other. Of the two reported cases on this issue of commercial use of church property in Texas, of which this case is one, this unequal application of the law and its consequences have already been demonstrated. An Austin Court of Appeals, on remand, following the guidelines of the Texas Supreme Court held, based on the jury's findings, that a church's leased parking lots were not used primarily for religious purposes. The church's exemption was denied. (University Christian Church v. City of Austin, 789 S.W.2d 361, 366 (Tex. App. - Austin 1990, no writ). In this case, faced with identical law and virtually the same facts, the San Antonio Court of Appeals on remand, held, based on the jury's findings, that the church's leased parking lots were entitled to a tax exemption.[3] (Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554 (Tex. App. - San Antonio 1993, writ denied); (App. Vol I., p. 1a)

THE DECISION BELOW INVOLVES AN ISSUE WHICH NEEDS TO BE RESOLVED BY THIS COURT

This Court, when necessary, has repeatedly distinguished and clarified the Walz decision when it has been misapplied or

---

[3] Four other churches in San Antonio also use their parking lots for commercial purposes and do not currently enjoy a property tax exemption (App. Vol. II, pp. 92a-94a). If each case is decided on a "case by case" basis without any constitutional standards to follow, one church, such as First Baptist, will enjoy a tax exemption on its leased parking lots, while its next-door neighbor might not, thereby allowing one church the benefit of government sponsored support to the detriment of another church that would not enjoy such support.

misinterpreted by lower courts in order to ensure that the Establishment Clause of the First Amendment is not violated; e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

Here, the Texas Supreme Court refused to review Petitioners' constitutional challenges even when the dissent in City of Austin (City of Austin, 768 S.W.2d at 721) and in this case raised constitutional alarms over the consequences of the majority's opinion (App. Vol II, pp. 37a; 44a). In this case, Justice Cook, concurring in the majority opinion, expressly adopts the constitutional standards previously rejected in Walz.[4] (Walz, 397 U.S. at 674). The Texas Supreme Court has, in effect, condoned an unconstitutional interpretation and application of the Texas statutory exemption scheme by letting stand the appeals court opinion in this case holding that commercial use of a church's property is constitutionally permissible.

CONCLUSION

In short, the Texas property tax exemption scheme, as interpreted by Texas Courts, fails to meet the minimum First Amendment standards repeatedly upheld by this court in its prior decisions.

As applied by the Texas courts, these First Amendment safeguards are ignored when the State's laws are subjectively and

---

[4] Judge Cook's opinion as earlier noted states that the legislative purpose of the State's property exemption law was to favor religion. Moreover, in his explanation of why Texas favors granting religious exemptions, Justice Cook adopts the "good works" and social benefits theory specifically rejected in Walz. (First Bapt., 833 S.W.2d at 114; App. Vol. I, p. 36a) Justice Cook, in doing so, ignores the implications in Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 316 F. Supp. 1116 (S.D. Fla. 1970), vacated as moot when the Florida legislature amended its property tax laws to exclude exemptions of church property used for commercial purposes, 404 U.S. 412 (1972), on the grounds that the Texas statute in this case was not yet challenged in the federal system. (First Bapt., 833 S.W.2d at 113, n.1, App. Vol. I, pp. 34a-35a, n.1.)

selectively interpreted to favor religious exemptions over secular, thereby resulting in the twin evils of government sponsorship of religion and excessive state entanglement with religion.

Accordingly, for the reasons stated, the judgment of the trial court declaring these commercially used church parking lots exempt from taxation should be reversed.

Respectfully submitted,

Dennis K. Drake
Lincoln Center, Suite 235
7800 IH 10 West
San Antonio, Texas 78230
Telephone: (210) 366-9636
ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS
and INDEX OF AUTHORITIES

APPENDIX

Volume I

Fourth Court of Appeals Opinion and
Judgment on Remand (January 20, 1993) 1a
Fourth Court of Appeals First Opinion
(October 10, 1990) 19a
Texas Supreme Court's Opinion
(Majority and Concurring, pp. 27a-36a)
(June 10, 1992) 27a

INDEX OF AUTHORITIES

Bexar County Appraisal Review Board v. First Baptist Church,
800 S.W.2d 892 (Tex. App. - San Antonio 1990) 19a
Bexar County Appraisal Review Board v. First Baptist Church,
846 S.W.2d 554 (Tex. App. - San Antonio 1993, writ denied) ..
..... 1a
First Baptist Church of San Antonio v. Bexar County Appraisal
Review Board, 833 S.W.2d 108 (Tex. 1992) 27a

[See Appendix pages 37a-102a in Volume II]

COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT OF TEXAS

SAN ANTONIO

OPINION

Appeal No. 04-89-00543-CV

BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,

Appellant

v.

FIRST BAPTIST CHURCH, et. al.,

Appellee

Appeal from the 224th District Court of

Bexar County

Trial Court No. 84-CI-20348

Honorable Carolyn H. Spears, Judge Presiding

ON APPELLANTS' MOTION FOR REHEARING

Opinion by: David Peeples, Justice

Sitting: Blair Reeves, Chief Justice

Shirley W. Butts, Justice

David Peeples, Justice

Delivered and Filed: January 20, 1993

APPELLANTS' MOTION FOR REHEARING DENIED;

JUDGMENT AFFIRMED AS REFORMED.

The motion for rehearing is overruled. Our previous opinion is withdrawn and replaced by the following.

Earlier in this property tax exemption case, we held that the evidence was legally insufficient to support the jury's finding that a church parking lot was used primarily for religious purposes. Bexar County Appraisal Review Bd. v. First Baptist Church, 800 S.W.2d 892 (Tex. App.--San Antonio 1990). The supreme court disagreed with that ruling and returned the cause to us for consideration of points of error that we did not reach. First Baptist Church v. Bexar County Appraisal Review Bd., 833 S W 2d 108 (Tex. 1992).

Appellants Bexar County Appraisal Review Board and the Bexar Appraisal District (collectively referred to as the district) appeal from a judgment based on a jury finding that two parking lots owned by the First Baptist Church of San Antonio and leased to the Valero Realty Company are exempt from property taxes for 1984-1986. The judgment ordered that the value of the property on the appraisal roll be reduced to zero, and decreed that the property is exempt from taxation for the three years. The judgment also awarded the church attorney's fees. Additional facts may be found in the two reported opinions.

The district complains that: (1) the judgment exempting the property from taxation is unconstitutional, (2) the award of attorney's fees was unauthorized, and (3) the court made certain erroneous rulings during trial.[1] In one cross-point, the church and Valero seek damages on the ground that the district's claim of unconstitutionality is frivolous and was made for purposes of delay. The district also contends that the evidence is factually insufficient, but the supreme court held the evidence legally sufficient, and in view of its construction of the exemption statute, we hold that the evidence is factually sufficient as well.

I.

We consider first the district's contention that the exemption violates the Texas Constitution, which mandates a tax exemption for "actual places of religious worship" and states that "all laws exempting property from taxation other than the property mentioned in this Section shall be null and void." TEX. CONST. art. VIII, § 2. The district argues that the parking lot at issue in this case is not an actual place of religious worship, and that to exempt it from property taxation goes beyond article eight, § 2 and is void.

---

[1]The district also argues that the trial court erred in its submission of jury question one and its accompanying instructions. The supreme court dismissed that argument as meritless and we need to consider it further. See 833 S.W.2d at 110 n.2. Contrary to the district's suggestions, the issue did not improperly comment on the weight of the evidence or advise the jury of the effect of its answers.

The exemption for a church parking lot leased to a private corporation certainly does not appear to fall within a common-sense reading of the constitution's language, "actual places of worship." But the supreme court has twice stated that "a parking lot may qualify as a place of religious worship." First Baptist Church v. Bexar County Appraisal Review Bd., 833 S.W.2d at 110; City of Austin v. University Christian Church, 768 S.W.2d 718, 719-20 (Tex. 1988). In University Christian Church, the court said, "For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church." Id. at 719. At bottom, the district asks us to adopt the argument made by the dissent in University Christian Church. Though the majority in University Christian Church did not specifically address the constitutional argument, it clearly did not accept it. The supreme court has held that a parking lot may constitute a place of worship under the statute, and the jury has found that it does in this case. In the face of the supreme court's considered statements, quoted above, we cannot fairly hold that a parking lot is not an actual place of worship under the constitution.[2] We hold that the exemption before us does not violate article eight, § 2.

We next consider the district's argument that the tax exemption violates the First Amendment to the United States Constitution. Generally a statute violates the establishment clause only if (1) it is motivated wholly by an impermissible purpose; (2) its primary effect is to advance religion; or (3) it excessively entangles church and state. See Bowen v. Kendrick, 487 excessively entangles church and state. See Bowen v. U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The United States Supreme Court

---

[2]We are aware that the constitution refers to "actual" places of worship, while the statute does not use that term. Nevertheless, we conclude that it would violate the spirit of the court's two decisions to distinguish them on this basis.

used a slightly different analysis in upholding a similar property tax exemption in Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The statute before us satisfies each standard.

The Court in Walz stressed that the religion clauses mean that such exemptions must be neutral in purpose and effect:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.

Id. at 669, 90 S.Ct. at 1411-12, 25 L.Ed.2d at 701-702 (emphasis added). The Court then reasoned that the exemption did not have an improper purpose or an entangling effect, and that it was consistent with the uninterrupted historical practice of benevolent state and congressional neutrality toward religion in this country. The purpose of the tax exemption, said the Court in Walz, "is neither advancement nor the inhibition of religion; it is neither sponsorship nor hostility....[The state] has not singled out one particular church or religious group or even churches as such; rather, it has granted

exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Id. at 672-73, 90 S.Ct. at 1413, 25 L.Ed.2d at 703-704. That is, the exemption for church property was part of a general tax exemption for a broad variety of nonprofit, charitable activities. The statute did not attempt to establish religion; it simply "spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions." Id. at 673, 90 S.Ct. at 1414, 25 L.Ed.2d at 704.

Nor did the statute have the effect of excessive governmental entanglement with religion. Both taxation and exemption would require some involvement with religion. "The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." Id. at 675, 90 S.Ct. at 1414, 25 L.Ed.2d at 705. "The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." Id. at 676, 90 S.Ct. at 1415, 25 L.Ed.2d at 705.

Finally, the Court reasoned that constitutional interpretation should not stray too far from its historical moorings. Cardozo had warned about the "tendency of a principle to expand itself to the limit of its logic."[3] The Court replied that history sets limits on the step-by-step expansion of legal rules; "such expansion must always be contained by the historical frame of reference of the principle's purpose." Id. at 679, 90 S.Ct. at 1416, 25 L.Ed.2d at 707. The Court noted that in an 1886 case it had accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment." Id. at 680, 90 S.Ct. at 1417, 25 L.Ed.2d at 708, citing Gibbons v. District of Columbia, 116 U.S. 404, 6 S.Ct. 427, 29 L.Ed 680 (1886).

---

[3]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

Like the New York statute at issue in Walz, the statute before us does not differentiate among religions, and it extends the exemption to various nonsectarian groups, such as charities, schools, and veterans' organizations. See TEX. PROP. TAX CODE §§ 11.11 et seq. (Vernon 1992). Thus the statute bears no resemblance to the sales tax exemption condemned in Texas monthly. Inc. v. Bullock, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), which singled out religious publications for a tax exemption. The statute's purpose is to avoid taxation on charitable organizations, including religious organizations. There is nothing improper about that legislative purpose. Nor does the statute advance religion or produce excessive governmental entanglement -- administrative or otherwise -- with religion. And the exemption has history on its side, having been part of the Texas Constitution since 1876. See TEX. CONST. art. 8, § 2 (Vernon 1955, historical note).

The district points out that the tax exemption upheld in Walz required that the religious use be exclusive, while the Texas statute requires only that the religious use be primary. Here, of course, the district seeks to tax only the church property that is used for commercial purposes, not the property used exclusively for religious purposes. The issue in this case is not whether church property is exempt from taxation, but whether that exemption is lost when the church uses the property for commercial purposes.

It is true that the exemption involved in Walz required that the property be used exclusively for religious purposes. But nothing in Walz suggested that it would violate the First Amendment to exempt religious property used primarily but not exclusively for religious purposes. The purpose and effect of the Texas exemption are the same as those of the New York statute discussed in Walz. The Texas Supreme Court has upheld the jury finding that the property at issue here is being used primarily for religious purposes. See 833 S.W.2d at 110-11. Our previous opinion upheld the finding that it is "reasonably necessary" for engaging in worship. See 800 S.W.2d at

896. We think such an exemption is sufficiently covered by the Court's reasoning in Walz even though the statute does not require that the religious use be exclusive.

The district also argues that religion is being singled out for favoritism because church property is exempt if used primarily for religious purposes, while other charitable property must be used exclusively for charitable purposes. It is true that the exemptions for charitable organizations, youth development associations, and schools extend to property used "exclusively" for the organization's purposes. See TEX. TAX. CODE §§ 11.18(a)(2), ll.l9(a)(2), 11.21(a)(2) (Vernon 1992). But each statute softens these provisions and preserves the tax exemption if the non-organizational use is "incidental." See id. §§ 11.18(b), ll.l9(b), 11.21(b). The miscellaneous exemptions in the same statute generally do not require exclusively charitable use. See Id. § 11.23. We conclude that the legislature has coordinated the religious and other charitable exemptions with reasonable equality and with an even hand, and that any difference cannot be called an establishment of religion under Walz.

The district also cites article one, § 6 of the Texas Constitution, which provides: "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." TEX. CONST. art. I, § 6. The district has simply cited this provision without briefing or analysis beyond its discussion of the First Amendment's establishment clause. We have rejected its First Amendment contention. It has not argued that the state constitution differs from federal law in any way. It has not analyzed the language or background of article one, § 6; nor has it cited state cases. To the extent that the district's state law contention differs from its federal contention, it has been waived by failure to brief it. See McPherson Enter. Inc. v. Producers Coo~. Marketing Ass'n, 827 S.W.2d -94, 96 (Tex. App.--Austin 1992, no writ); White v. Bath, 825 S.W.2d 227, 230 (Tex. App.--Houston [14th Dist.] 1992, writ denied); TEX. R. APP. P. 74(f).

II.

The district challenges the court's award of $125,439.18 in attorney's fees to the church. Ordinarily, attorney's fees may not be recovered in the absence of statutory authority or a contract between the parties. See Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 77 (Tex. 1992); First City Bank v. Guex, 677 S.W.2d 25, 30 (Tex. 1984); Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 803-804 (Tex. 1974). In defense of the attorney's fee award, the church cites the tax code and the declaratory judgments act.

Under the tax code a taxpayer who successfully appeals an excessive appraisal or an unequal appraisal may recover reasonable attorney's fees.[4] The tax code does not expressly authorize recovery of attorney's fees to taxpayers who successfully obtain exemptions, and the church does not contend that it does. Instead, the church argues that the exemption that it sought and was granted amounted to a lowering of the appraisal from more than $2,000,000 to zero, and

---

[4]During the years at issue in this suit, 1984-1986, the tax code provided as follows:

§ 42.25. Remedy for Excessive Appraisal

If the court determines that the appraised value of property according to the appraisal roll exceeds the appraised value required by law, the property owner is entitled to a reduction of the appraised value on the appraisal roll to the appraised value determined by the court.

§ 42.26. Remedy for Unequal Appraisal

The district court may not grant relief on the ground that a property is appraised unequally in comparison to the level of appraisals of other property in the appraisal district unless the appraised value of the property varies at least 10 percent from its value calculated on the basis of the weighted average level of appraisals in the district. In that event, the court shall order the appraised value changed to the value as calculated on the basis of the weighted average level of appraisals in the district.

§ 42.29. Attorney's Fees

A taxpayer who prevails in an appeal to the court under Section 42.25 or Section 42.26 of this code may be awarded reasonable attorney's fees not to exceed the greater of $5,000 or 20 percent of the total amount of taxes in dispute.

TEX. PROP. TAX CODE §§ 42.25, 42.26, 42.29 (Vernon 1992 and explanatory notes). Later amendments to §§ 42.26 and 42.29 do not affect this appeal.

therefore it can recover attorney's fees because it challenged an excessive appraisal. In this regard, the judgment did not stop at declaring the property exempt from taxation. The court went further and "found" that "the appraised value of the property, according to the appraisal roll, exceeds the appraised value required by law, and that the First Baptist Church is entitled to a reduction of the appraised value on the appraisal roll to zero for each of the tax years in question (1984, 1985, 1986)" (emphasis added). We reject this basis for recovering attorney's fees.

The statute plainly confines attorney's fees awards to cases of excessive or unequal appraisals, and not exemptions. It is true that the church asked for and the court granted both the exemption and a declaration that the appraised value was zero. The court even ordered the district "to correct the appraisal roll to reflect that the market value of the properties" is zero, even though the parties had stipulated that if the exemption were denied the market value exceeded $2,000,000. But that does not bring the case within sections 42.25 and 42.26. It would require pure sophistry for us to hold that this was a suit about valuation and appraisal instead of exemption. We agree with the court in Coastal States Crude Gathering Co. v. State Property Tax Board, 747 S.W.2d 61, 63 n.1 (Tex. App.--Austin 1988, no writ), that "this lawsuit dealt with the question of whether the property should be appraised and taxed at all, not the value of the appraisal." In an analogous context, the courts have held that a suit to establish an open-space land designation is not a suit to contest excessive or unequal appraisal, and therefore attorney's fees are not recoverable. See Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 79 (Tex. 1992); Kerr Central Appraisal Dist. v. Stacy, 775 S.W.2d 739, 743 (Tex. App.--San Antonio 1989, writ denied). We hold that because the suit was in reality to establish an exemption and not to rectify an unequal or excessive appraisal, the tax code does not support the award of attorney's fees.

The church also argues that it sought and received a declaratory judgment and that the declaratory judgment act supports the attorney's fees award. Section 37.009 of the act provides, "In any proceeding under this chapter [declaratory judgments], the court may award costs and reasonable and necessary attorney's fees as are equitable and just." See TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986). But a litigant may not seek a declaratory judgment in an existing suit simply to recover attorney's fees that are otherwise not authorized by statute. City of Laredo v. South Texas Nat'l Bank, 775 S.W.2d 729, 732 (Tex. App.--San Antonio 1989, writ denied); Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 235-36 (Tex. App.--Dallas 1988, writ denied). "The Declaratory Judgments Act is 'not available to settle disputes already pending before a court.'" BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 841 (Tex. 1990), quoting Heritage Life, 751 S.W.2d at 235.

This rule is essential as long as the legislature chooses to authorize attorney's fees in some situations and to deny them in others. If the law were otherwise, litigants could routinely create a right to attorney's fees by seeking a declaration that they are entitled to relief on claims for which attorney's fees are not recoverable. In tort suits, for example, litigants could seek a declaration of liability -- or nonliability -- and thereby recover attorney's fees. See Weaver v. Aids Servs. Inc., 835 S.W.2d 798, 803 (Tex. App.--Austin 1992, writ denied). In an analogous situation, the court has held that a potential tort defendant may not use the declaratory judgment act to seek a declaration of nonliability and thereby choose favorable venue. See Abor v. Black, 695 S.W.2d 564 (Tex. 1985). The declaratory judgment act does not support the award of attorney's fees.

For the reasons stated, we sustain the district's point one and reform the judgment to delete the award of attorney's fees.

III.

The district next complains about various trial rulings admitting evidence and about the church's jury argument.

The court allowed the church to question a witness for the district about exemptions the district had granted to the City of San Antonio and to other nonchurch taxpayers. Clearly, this evidence was not relevant to the main issue in the case -- whether the church met the standards of § 11.20(a)(1) of the tax code.[5] The church either met the statutory requirements for exemption or it did not, and whether the city had granted an exemption to other taxpayers had nothing to do with whether the church qualified under the statute. For this reason, the church pleaded that the district had violated the federal and state equal protection provisions by appraising its property "unequally and un-uniformly in comparison with other similar properties." The church argues that the evidence about other exemptions was relevant to its claim of unequal treatment.

The church did not present evidence to raise an issue on this cause of action, and did not even request that it be submitted. Nevertheless, the court did not err in allowing the church to question the district's head appraiser about these other exemptions. The matter was pleaded, and the district had not removed it from the case by summary judgment.

"The government does not lose its right to taxes justly owing on one parcel of property, by reason of the failure of its officers, either negligently or designedly, to assess other property that is likewise taxable." City of Arlington v. Cannon, 153 Tex. 566, 271 S.W.2d 414, 416 (1954), quoting City of Wichita Falls v. J.J. & M. Taxman

---

[5]Section 11.20 of the property tax code provides in pertinent part as follows:

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

> (1) the real property that [1] is owned by the religious organization, [2] is used primarily as a place of regular religious worship, and [3] is reasonably necessary for engaging in religious worship. . . .

TEX. PROP. TAX CODE §11-20 (Vernon 1982) (emphasis added).

Refining Co., 74 S.W.2d 524, 530 (Tex. App.--Fort Worth 1934, writ ref'd). The court said essentially the same thing in these words:

> If a valuation fixed by a board of equalization is attacked on the ground of unlawful or arbitrary discrimination it is not sufficient to show, comparatively, that in other isolated instances, property of equal or greater value than that in suit was valued at less . . . or even that other property was omitted from the tax rolls altogether...except where the omission was the result of a deliberate and arbitrary plan or scheme to permit certain classes of property to escape their fair share of the tax burden.

State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569, 573 (1954) (citations omitted). There is no suggestion here that the district omitted property from the tax rolls pursuant to a scheme to permit classes of property to escape taxation, which Whittenburg requires.

Nevertheless, given the state of the pleadings, which included the count for denial of equal protection, we cannot say that the court erred in admitting the evidence.

Over the district's objection, the court also allowed the church to elicit from a Valero witness testimony about several of Valero's charitable works.[6] The witness described Valero's involvement raising money for the United Way, the American Cancer Society, the Salvation Army, the American Heart Association, and "various universities." The witness also told of Valero's yearly Christmas party given for children from an orphanage. He added, "Any charity here in town that's established, we've got some participation, either volunteer time or money." Similarly the church was permitted to list such charitable works as its counseling ministry, a soup kitchen, a dental

---

[6]Under the 1980 lease agreement, Valero is responsible for the upkeep and maintenance of the lots and for the payment of all property taxes over and above the 1979 tax rate. In 1984-1986 it paid the church rental of $111,925 per year for use of the parking spaces.

clinic, and a refugee ministry for boat people and others who fled Southeast Asia after the Vietnam War.

No one contends that Valero's character was an issue in the case, or that its good or bad character was relevant to any issue before the jury. The jury was asked only whether the church's parking lot met the statutory qualifications for the tax exemption. The church argues that it is "just good lawyering" to humanize and personalize a corporate entity. We will go even further and say that good lawyers everywhere would be eager to prove up their clients' good deeds and the evil deeds of their opponents, if the rules permitted it. Under such a system, trials would turn into contests about which party has the better charitable record. There might be no end to the evidence litigants would present about themselves and their opponents. But in civil cases the rules strictly limit the admissibility of evidence of good or bad character. See TEX. R. CIV. EVID. 404-405; see generally 33 STEVEN GOODE, ET AL., GUIDE TO TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL. §§ 401.1-405.3 (Texas Practice 1988 & Supp. 1991). The evidence was not admissible on grounds that it was relevant to a jury issue.

The church argues the district had opened the door during its opening statement by mentioning that several Valero executives were attending the trial and that it and the church were represented by two lawyers. (Counsel for the district had also established that Valero was in business for profit and was not a charitable or nonprofit entity, which was proper in this case involving the statutory exemption for religious and charitable activities.) Beyond any doubt, it has become increasingly common for attorneys to use prejudice as a weapon in the modern-day lawsuit. Trial judges should use their authority under evidence rules 401-403 to exclude evidence with weak probative value concerning the jury issues and strong prejudicial impact. Here the district's alleged door-opening remark -- a mere reference to the presence of corporate executives in the courtroom -- seems tame in comparison to prejudicial remarks employed in other kinds of

litigation. A similar argument was recently used against a church in Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 561-62 (Tex. App. -Texarkana 1992, writ denied). Nevertheless, we think it was within the court's broad discretion to admit the evidence.

The district also challenges the court's admission of evidence that a Baptist church in downtown Houston had moved to the suburbs because it had no parking space downtown. That evidence was relevant to the issue of whether a parking lot was "reasonably necessary for engaging in worship," which 11.20 of the statute required the church to prove and which the court submitted in its charge. The court properly admitted the evidence.

The District also complains about portions of the church's jury argument. The church's lawyers had agreed to the district's motion in limine, which asked that counsel not comment on its failure to call witnesses without first approaching the bench for a ruling. Nevertheless, lead counsel for the church asked a witness for the district whether certain employees were still employed, still living in town, and whether they would "be here today to testify." Counsel for the district objected. The court sustained the objection and said, "Go into some other line of questioning. You may not argue that."

In final argument the church's attorney asked the jury, "Now, where are the people with the firsthand knowledge who could have come down here and talked? You haven't heard anybody from the Appraisal District with firsthand knowledge." The court sustained the district's objection.

This argument was a clear violation of the in-limine ruling. Counsel argues in this court that he thought the court had simply prohibited mention of witnesses equally available to both parties. But the in-limine ruling plainly forbade comment on the District's failure to call "any" witnesses, and any doubt about the reach of that ruling had been eliminated earlier during trial when the court sustained the district's objection to the church's questions about whether certain

district employees were still in town and whether they would "be here to testify."

Even without the in-limine ruling, the argument was questionable. In certain circumstances the trial court may allow counsel to comment on the opposite party's unexplained failure to call a witness. The witness (1) must be under the opponent's control or must stand in some special relationship to the opponent, and (2) must have been in a position to obtain material information unfavorable to the opponent about an issue in the case. In addition, (3) the record must show that the witness is legally available. See Tex-Jersy Oil Corp. v. Beck, 157 Tex. 541, 305 S.W.2d 162, 167 (1957), overruled on other grounds, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); First Interstate Bank v. Bland, 810 S.W.2d 277, 289 (Tex. App.--Fort Worth 1991, no writ); Johnson v. Smith, 446 S.W.2d 357, 359 (Tex. Civ. App.--San Antonio 1969 writ ref'd n.r.e.); 4 MCDONALD, TEXAS CIVIL PRACTICE § 23:12 (1992).

Comment on the failure to call a witness is appropriate only when it is clear that the uncalled witness may have adverse knowledge about a material disputed fact. In Tex-Jersey, for example, the company did not call an eyewitness to an accident scene. In Gulf, Colorado & Santa Fe Railroad v. Parmer, 389 S.W.2d 558, 564 (Tex. Civ. App.--Beaumont 1965, writ ref'd n.r.e.), the railroad did not call an employee, present in the courtroom, who might have tampered with the accident scene before a photographer took pictures. In several cases there was comment about a litigant's failure to call a doctor who had pertinent information. See MCDONALD, supra, 23:12, at note 90.

Counsel may not comment on the adverse party's failure to call a witness unless the witness has information material to the issues before the jury. Trial courts therefore should not allow counsel to comment on the failure of a company to call employees who may know something about peripheral issues in the case. Otherwise lawyers would be penalized for concentrating on the heart of a case

and not presenting marginal or cumulative evidence. Surely our legal system should not permit one advocate to implicitly criticize the other in final argument for getting to the crux of a case instead of presenting testimony about each and every minute matter that might have some relevance to the issues. Under our rules many bits of evidence, coming from many potential witnesses, might be considered relevant -- that is, having a tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. See TEX. R. CIV. EVID. 401. Trials last long enough already, and the law should not motivate advocates to call extra witnesses for fear of being criticized in jury argument for not presenting every possible witness under their control.

The argument before us appears to criticize the district for failing to present witnesses on peripheral issues, something the court certainly had the discretion to forbid. By granting the district's motion in limine and sustaining its objections during trial, the court had forbidden the mention of the failure to call witnesses. The central question in the trial was whether the church qualified under the statutory definition for the exemption; there is no indication that the district's employees withheld or had access to any pertinent information. And counsel's argument seems especially unnecessary because the information bearing upon the exemption rested with the church and Valero, not with the district, and because the rules make it so easy to depose or subpoena adverse witnesses. The witnesses may have had information relevant to the church's claim that it had received unequal treatment in comparison to other similar property, but that claim was not submitted to the jury.

Nevertheless we cannot reverse the judgment unless the record shows that the argument was reasonably calculated to cause and probably did cause rendition of an improper judgment. See TEX. R. APP. P. 81(b)(1). No reversible error is shown.

The district makes an additional complaint about the church's jury argument, which dealt with how the church spent the tax savings.

It also complains of two instances in which the court sustained objections to his attempted cross-examination of Valero witnesses, the admission of a misleading photograph, and a ruling during voir dire. Having considered the whole record, we hold that in each of these instances even if the court's rulings were erroneous they were not reversibly harmful under TEX. R. APP. P. 81(b)(1).

IV.

We reject the church's request that we assess damages under TEX. R. APP. P. 84 for frivolous assertion of its constitutional arguments. Though we have overruled the district's constitutional challenge to this tax exemption, the challenge was certainly not frivolous. The district did not delay this appeal by adding constitutional arguments to its other plausible contentions; one of them we have sustained, and others presented error, though we have found the error harmless.

* * * * *

We have considered all the district's complaints about the judgment. With the exception of the award of attorney's fees, all are overruled.

We reform the judgment to delete the award of attorney's fees. As reformed, the judgment is affirmed.

DAVID PEEPLES

Justice

PUBLISH

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

JUDGMENT

Appeal No. 04-89-00543-CV

BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,

Appellant

v.

FIRST BAPTIST CHURCH, et. al.,

Appellee

Appeal from the 224th District Court of

Bexar County

Trial Court No. 84-CI-20348

Honorable Carolyn H. Spears, Judge Presiding

BEFORE CHIEF JUSTICE REEVES AND

JUSTICES BUTTS AND PEEPLES

JUDGMENT

In accordance with this Court's opinion of this date, the motion for rehearing is DENIED.

We reform the judgment to delete the award of attorney's fees. As REFORMED, the judgment is AFFIRMED.

/S/

DAVID PEEPLES

JUSTICE

SIGNED January 20, 1993.

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
OPINION
Appeal No. 04-89-00543-CV
BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,
Appellant
v.
FIRST BAPTIST CHURCH, et. al.,
Appellee
Appeal from the 224th District Court
of Bexar County
Trial Court No. 84-CI-20348
Honorable Carolyn H. Spears, Judge Presiding
Opinion by: David Peeples, Justice
Sitting: Shirley W. Butts, Justice
Blair Reeves, Justice
David Peeples, Justice
Delivered and Filed: October 10, 1990
REVERSED AND RENDERED.

Appellants Bexar County Appraisal Review Board and the Bexar Appraisal District (collectively referred to as BCARB) appeal from a judgment based on a jury finding that two parking lots owned by the First Baptist Church of San Antonio (the church) and leased to the Valero Realty Company (Valero) are exempt from property taxes for 1984-1986. The judgment ordered that the value of the property on the appraisal roll be reduced to zero, and decreed that the property is exempt from taxation for the three years. The judgment also awarded the church attorney fees. We reverse and render judgment that the property is not exempt from taxation.

The church is located in downtown San Antonio, across the street from Valero Realty Company, a subsidiary of Valero Energy Corporation. The church has been in its present location since

approximately 1905; it acquired the disputed parcels of land piecemeal over a twenty-year period, beginning in 1957. On the subject property are two parking lots near Valero, which are owned by the church but leased to Valero for its use on weekdays from 7:30 A.M. to 5:00 P.M. The lease agreement, signed in 1980, provides that Valero is responsible for the upkeep and maintenance of the lots, and for the payment of all property taxes over and above the 1979 tax rate. The lease permits Valero to park on 407 of 447 spaces during the stated weekday working hours, but reserves to the church the use of the lots at all other times. In 1984-1986 Valero paid the church a rental of more than $111,000 per year.[7]

The church sought an exemption on these lots in 1984, which was denied. It exhausted its administrative remedies and then filed suit for the tax year 1984. The church filed again for an exemption in 1985, which was granted and then automatically renewed in 1986. In October 1986, BCARB reversed its decision and denied the 1985 and 1986 exemptions that had been granted. The church again exhausted its administrative remedies and filed suit for the tax years 1985 and 1986. Valero was joined as a party over BCARB's objection, and the two suits were consolidated, the church and Valero seeking to reverse the denial of the exemption. The parties stipulated that the market value of the property, if the exemption were denied, exceeded two million dollars. The jury found that the property was entitled to the exemption, and the court rendered judgment on the verdict.

BCARB presents five points of error, complaining that (1) the award of attorney's fees was unauthorized, (2) the court made certain erroneous rulings during trial, (3) the evidence is legally and factually insufficient, (4) the judgment is unconstitutional, and (5) the court erred in its submission of jury question one and its accompanying instructions. In one cross-point, the church and Valero seek damages

---

[7]During the three years in question, the church received a yearly rental of $111,925, calculated at $275 per space per year for 407 spaces.

on the ground that the claim of unconstitutionality is frivolous and was brought for purposes of delay. Because the record does not contain legally sufficient evidence that the parking lots were used primarily for a religious purpose, we reverse and render judgment that they are not exempt from taxation for 1984-1986.

BCARB challenges the legal sufficiency of the evidence to support the jury's finding that the church was entitled to the exemption. In particular, BCARB says that there is no evidence that the property is used primarily for religious purposes, as the law requires and as the jury impliedly found.

Section 11.20 of the property tax code provides in pertinent part as follows:

> (a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:
>
> > (1) the real property that [1] is owned by the religious organization, [2] is used primarily as a place of regular religious worship, and [3] is reasonably necessary for engaging in religious worship. . . .

TEX. PROP. TAX CODE §11.20 (Vernon 1982) (emphasis added). The statute further provides that if property otherwise satisfies §11.20(a), its use "for occasional secular purposes other than religious worship does not result in loss of the exemption if [1] the primary use of the Property is for religious worship and [2] all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship." Id. 11.20(d) (emphasis added).

The supreme court recently construed these provisions in a parking lot case somewhat similar to our own. In City of Austin v.

University Christian Church, 768 S.W.2d 718 (Tex. 1988), the court interpreted the statute in the context of a church's rental of land to a commercial parking lot company, while retaining use of the lots on Sundays and at other times. Concerning the statute at issue in the present case, the court held that "place of religious worship" is not limited to the sanctuary:

> For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church.

Id. at 719. "Under this definition," continued the court, "a parking lot may qualify as a place of religious worship." Id. at 719-20. But in order for the parking lot to be tax exempt, its use must be "primarily religious" within 11.20(a)(1):

> Whether a parking lot used in connection with regular religious worship is tax exempt, however, depends on (1) whether the religious organization owns the property, (2) whether the property's use is Primarily religious, and (3) whether the property's use is reasonably necessary to the religious worship.

Id. at 720 (emphasis added). The remainder of the court's opinion stresses the statute's requirement of primary use. Rejecting the efforts of both parties to have it decide the issue as a matter of law, the court said that "the property's primary use is, and remains, an issue of fact for the jury." Id.[2] In the present case the trial court submitted the

---

[2]On remand the court of appeals held that the evidence was factually sufficient to support the jury finding that the property was not exempt. 789 S.W.2d 361 (Tex. App.--Austin 1990, no writ).

exemption question with instructions that stated the law set forth in 11.20(a) and University Christian Church.[3]

Under these authorities, the church had the burden of producing evidence that the use of the parking lots was primarily religious, and our question is whether the record contains such evidence. While the court in University Christian Church said that primary use is a jury question, there must of course be legally sufficient evidence of primary religious use before the matter becomes a jury question because the legislature did not authorize courts or juries to grant exemptions without legally sufficient proof of the statutory requirements.

Bearing in mind the standard of review for no-evidence points of error, we consider the evidence in the light most favorable to the verdict. See Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965). The evidence of primary use is simple and uncontested. Valero has the right to park in 407 of 447 spaces from 7:30 A.M. to 5:00 P.M. Monday through Friday each week. Church members can use the

---

[3]Jury question number one read as follows:

Find, from a preponderance of the evidence, whether the First Baptist Church of San Antonio is entitled to an exemption on the property the subject of this lawsuit.

we the Jury answer:

The property should be exempt: [Yes]

The property should not be exempt: _____

You are instructed that in order to qualify for an exemption that the property must be owned by a religious organization; be used primarily as a place of regular religious worship; and, be reasonably necessary for engaging in religious worship. You are further instructed that the use of the property for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship, and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

"Religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage and commitment in behalf of a religious faith.

You are further instructed that in considering whether the property the subject of this suit should be exempt, that a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the Church.

other forty spaces at any time, and the entire lot is available to them on Saturdays and Sundays and from 5:00 P.M. to 7:30 A.M. during the week. Clearly the lot is available for church access during a majority of the hours of each week.[4] The only evidence in our record relating to the church's actual use of the parking lots was that the lots were used by church members on Sundays in order to attend religious services and on Wednesday evenings to attend a prayer meeting; there was "some" use of the lots for special events and on Saturdays; the lots were rarely used by church members after 7:00 in the evening; and the lots were not used by the church at all after 10:00 in the evening. One church member specifically testified that he could not recall any other religious use of the property (such as for revivals or choir practice) since 1980.

In response to BCARB's argument that Valero uses the lots much more than the church does, the church states that the inquiry is more than a mathematical calculation of the number of hours that it and Valero use the lot. It then notes that if calculation of hours is the issue, it had "total use" of the property a majority of the time. The church also says that the primary use of the property, from its point of view, is as a place for its congregation to park, as a buffer against encroachment, and as assurance of adequate room for growth. A secondary use, it says, is "to generate income." The church points to

---

[4]The following exchange between counsel for BCARB and a church witness exemplifies the testimony on the issue of primary use (emphasis added):

Q. [Valero is] using the church property. And really, we can say that each and every day of the week we've got nine-and-one-half hours that Valero is using this property, which are the parking lots, Monday through Friday. Now, you agree with that?

A. Yes, sir.

Q. And then, how much time out of the Monday through Friday would you assign to church use between, let's say, 5:00 p.m. through the rest of the evening, with the exception of the 40 spaces, which I understand are always reserved for the church?

A. Well, the balance of the day is for church use.

Q. Yes, sir. And are they actually used by the church members?

A. They are available for use.

no other evidence of primary religious use, and we have found none. The question therefore is whether (1) access to the lots for a majority of the week, plus (2) the fact that the actual use by the church is for religious purposes constitutes some evidence that the property is used primarily for religious purposes.

We hold that this evidence is legally insufficient because under the statute and University Christian Church the inquiry is the actual use of the property, not the church's primary reason for owning it or the amount of theoretical access the church enjoys. When the overall, day-to-day use of the property is considered, it is clear that the property is used almost entirely by Valero. The church does not contend that its right to access from 5:00 P.M. through the night until 7:30 A.M. constitutes evidence of primary religious use. The fact that Valero leaves the lots empty for fourteen and one-half hours each night and gives the congregation the right to enter at night and on weekends does not mean that the lots are being used primarily for a religious purpose. Nor is primary religious use proved by evidence that from the church's viewpoint the lots are kept because it is necessary for a downtown church to have parking. Evidence that the church acquired the land and retains it for member parking and for future growth does not constitute evidence that it is used primarily for religious purposes. Whether ownership of the parking lots is necessary for this downtown church pertains to element three under 11.20(a), and nothing in this opinion is meant to cast doubt on the jury's implied finding on this element. But element three has no bearing on the second element at issue in this appeal -- primary use.

We stress that the issue before us is not whether the church is entitled to own property for parking and future growth, or whether it can lease its property on these or any other terms. We have not sustained BCARB's factual sufficiency challenge to the jury's implied finding that the parking lots were reasonably necessary for engaging in religious worship. No one questions that the church is entitled to own and lease property. The sole issue before this court is whether

such property remains tax exempt when there is no proof that it is used primarily for religious purposes. A church must make such proof in order to establish a tax exemption under § 11.20. we hold that the record contains no evidence that the two parking lots are used primarily for religious purposes, as the statute requires, and that accordingly the judgment granting, the exemption cannot stand.

The judgment ordering the tax exemption is reversed, and judgment is rendered that the lots in question are not exempt from taxation.

DAVID PEEPLES
Justice

PUBLISH

IN THE SUPREME COURT OF TEXAS

NO. D-0689

FIRST BAPTIST CHURCH OF SAN ANTONIO ET AL.,
PETITIONER

v.

BEXAR COUNTY APPRAISAL REVIEW BOARD ET AL.,
RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS

Opinion

In this property tax exemption case, we consider whether there is some evidence to support a jury finding that two parking lots owned by First Baptist Church of San Antonio and leased to Valero Realty Company qualified for a property tax exemption. The trial court rendered judgment that the parking lots were exempt from property taxes. The court of appeals reversed and rendered, holding that the parking lots were not tax exempt because there was no evidence that the parking lots were primarily used for religious purposes. 800 S.W.2d 892. We reverse and remand its cause to the court of appeals for further proceedings.

First Baptist Church of San Antonio ("the church") is located in downtown San Antonio, across the street from Valero Realty Company ("Valero"). The church owns two parking lots which it leased to Valero pursuant to a ten year agreement signed in 1980. The lease permitted Valero employees and visitors to use 407 of the 447 spaces from 7:30 a.m. to 5:00 p.m. Monday through Friday, but reserved use of the parking lots to the church at all other times. Valero paid a monthly fee to the church[1] and was responsible for maintenance

---

[1]Valero paid the church $111,925 per year from 1984 through 1986. This was calculated at $275 per parking space per year for 407 spaces.

and upkeep of the parking lots, and for payment of all property taxes above the amount set in 1979.

The church sought exemptions on these parking lots in 1984, 1985 and 1986. After the exemptions were denied, the church exhausted its administrative remedies and filed suits against the Bexar County Appraisal District and Review Board for the tax years 1984, 1985 and 1986. Valero filed a plea in intervention and the suits were consolidated for trial.

The jury found that the parking lots were tax-exempt,[2] and the trial court rendered judgment on the verdict. The court of appeals reversed and rendered, holding that there was no evidence that the parking lots were primarily used for religious purposes to justify a tax exemption.

I.

Section 11.20 of the Texas Tax Code establishes the criteria for determining if a religious organization qualifies for a tax exemption. Section 11.20(a)(1) provides that a religious organization is entitled to an exemption from taxation of "the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship...." Tex. Tax Code Ann. § 11.20(a)(1). Section 11.20(d) provides that if property satisfies the requirements of section 11.20(a)(1), its use "for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship." Tex. Tax

---

[2]In accordance with broad-form submission practice, the trial court properly submitted the issue to the jury as a broad question which asked whether the church was entitled to a tax exemption on the parking lots. The broad-form question was accompanied by instructions stating, among other things, the statutory requirements of section 11.20(a)(1) of the Texas Tax Code that had to be met in order for the church to qualify for an exemption. In finding that the church was entitled to an exemption, the jury implicitly found that the church met the statutory requirements of section 11.20(a)(1).

Code § 11.20(d). "For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church." City of Austin v. University Christian Church, 768 S.W.2d 718, 719 (Tex. 1988).[3] Thus, a parking lot may qualify as a place of religious worship. Id. at 719-20. But whether a church parking lot is exempt depends on whether the requirements of section 11.20(a)(1) are met. Although Bexar County Appraisal District and Review Board raised other points of error, the court of appeals held that there was no evidence that the parking lots were primarily used for religious purposes, and reversed and rendered judgment against the church. Consequently, the only issue before this Court is the primary use of the parking lots.

II.

The church argues that there is evidence that the parking lots were used primarily for religious purposes. After a review of the record, we agree.

In determining whether there is any evidence to support a jury finding, we consider only the evidence and inferences tending to

---

[3]In University Christian Church, the church owned two parking lots which it leased to Allright Parking. University Christian Church, 768 S.W.2d at 719. Under the terms of the lease, the church retained exclusive use of the parking lots on Sundays and was allowed to use the lots on various other occasions. Id. The Church received a monthly fee from Allright Parking, as well as a percentage of Allright Parking's gross receipts from its use of the parking lots. Id. The City of Austin and other taxing authorities sued the church to collect delinquent ad valorem taxes levied on the parking lots. The trial court rendered judgment for the taxing authorities based on the jury's failure to find that the property was primarily used for religious worship. Id. at 718. The court of appeals reversed and rendered judgment for the church, holding that the evidence conclusively established the property was primarily for religious worship. 724 S.W.2d 94. This Court held that the court of appeals erred in concluding, as a matter of law, that the church's parking lots were primarily used for religious worship, and remanded the case to the court of appeals to consider the factual sufficiency of the evidence. University Christian Church, 768 S.W.2d at 720-21. On remand, the court of appeals held that the jury's failure to find that the parking lots were used primarily for religious worship was not so against the great weight and preponderance of the evidence as to be manifestly unjust. University Christian Church v. City of Austin, 789 S.W.2d 361, 366 (Tex. App. - Austin 1990, no writ).

support the jury finding and disregard all evidence to the contrary. Lucas v. Texas Industries, Inc., 696 S.W.2d 372, 377 (Tex. 1984); see Murphy v. Hammons, 509 S.W.2d 845, 846 (Tex. 1974). If there is any evidence of probative value to support the jury's finding that the parking lots were primarily used for religious purposes, the jury's finding must be upheld. Lucas, 696 S.W.2d at 377.

In ascertaining whether there is any evidence that the parking lots were primarily used for religious purposes, we look beyond a mere mathematical calculation of the number of hours the church and its members physically occupied the parking lots versus the number of hours Valero physically occupied the parking lots. While the "actual use" of the property is an important factor in determining primary use, it is not the sole consideration. Instead, the use of the church property must be examined qualitatively as well as quantitatively. Thus, the primary use of church parking lots may not be determined by simply adding up the number of hours that church members actually park their cars on the lots.

At trial, the jury heard testimony that the property on which the two parking lots are located was purchased by the church to ensure adequate parking for church members attending church activities. In fact, several witnesses indicated that the church's primary use of the two parking lots was to provide church members with access to church facilities. The church reserved forty parking spaces for the exclusive use of its members, and reserved the remaining spaces for church use at all times except weekdays from 7:30 a.m. to 5:00 p.m. The church also had the right to use the parking lots on holidays observed by Valero. The parking lots were regularly used by church members on Sundays and Wednesday evenings, and sometimes used by church members on Saturdays and for special events throughout the week. Therefore, we hold that there is some evidence to support the jury's finding that the parking lots were used primarily for religious purposes.

The Bexar County Appraisal District and Review Board advanced several other points of error in the court of appeals but that court did not consider them because of its erroneous conclusion that the record contained no evidence that the parking lots were used primarily for religious purposes. We have the option of either examining the points of error not considered by the court of appeals in order to determine if any of those points will support the court of appeals' judgment or remanding the cause to the court of appeals for it to pass on the unconsidered points. See Coulson v. Lake LBJ Municipal Utility District, 734 S.W.2d 649, 652 (Tex. 1987). Because the unaddressed points of error include attacks on the sufficiency of the evidence, we believe judicial economy is best served by remanding the entire cause to the court of appeals for consideration of all previously unaddressed points.[4] Id.

Accordingly, we reverse and remand the cause to the court of appeals.

/S/
JACK HIGHTOWER
JUSTICE

OPINION DELIVERED: June 10, 1992
Concurring Opinion by Justice Cook. Dissenting Opinion by Justice Mauzy joined by Justices Doggett and Gammage.

---

[4]The previously unaddressed points include whether the church was entitled to attorney's fees, whether the trial court's rulings denied BCAD a fair trial, whether there was legally or factually insufficient evidence to support the jury's finding on issues other than the primary use of the property, whether there was factually insufficient evidence to support the jury's finding on the primary use issue, whether the trial court's judgment violates certain provisions of the United States Constitution or the Texas Constitution, whether the trial court erred in submitting the question and instructions concerning the church's right to an exemption, and the church's cross-point concerning delay damages.

IN THE SUPREME COURT OF TEXAS

No. D-0689

FIRST BAPTIST CHURCH OF SAN ANTONIO, ET AL.,
PETITIONERS

v.

BEXAR COUNTY APPRAISAL REVIEW BOARD, ET AL.,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS

CONCURRING OPINION

Today the court adopts a reasonable and practical approach to the problem of determining primary use of a place of religious worship. It is a fair approach, one which does not stretch the exemption beyond the constitutional limit or beyond the intent of the legislature. It is an approach which offers appraisal districts common sense guidance to the task of applying the concept of "primary use." And it does not, as the dissent would do, confine the exemption so narrowly as to eradicate it altogether.

Many states have grappled with the definition of "use" in statutes similar to ours. Most of these states apply a rule of strict construction to their exemption statutes. See, e.g., Church Divinity School v. Alameda County, 152 Cal. App. 2d 496, 314 P.2d 209, 211-12 (Cal. Ct. App. 1957). Entities claiming the exemption must show that they clearly come within the terms of the exemption. Id. at 212. Yet, even in the states which grant exemptions based only upon "exclusive use," the courts have recognized that a relentlessly narrow interpretation of the term "exclusive use" would destroy the exemption. Consequently, these states have adopted a statutory interpretation based upon reasonableness. See, e.g., id. at 212-214 (construction of statute must be reasonable one with due regard for ordinary meaning of language employed and object sought to be accomplished); Lutherans Outdoors in South Dakota, Inc. v. South

Dakota Bd. of Equalization, 475 N.W.2d 140, 143 (S.D. 1992) (Whether property is used exclusively for religious purposes is to be construed reasonably).

The constitution and the statutes of our own state "evince a liberality in the exemption from taxation of property for educational or religious purposes." Harris v. City of Fort Worth, 142 Tex. 600, 180 S.W.2d 131 (1944). This liberality is particularly evident in the current statute granting a tax exemption for real property used primarily as a place of regular religious worship, as long as it is reasonably necessary for engaging in religious worship. TEX. TAX CODE ANN. § 11.20(a)(1)(Vernon Supp. 1992). Section 11.20(a)(1) grants the exemption based on *primary use*, not *exclusive use*. That the legislature chose the word "primarily" intentionally and carefully is made clear by comparison to section 11.20(a)(3), which grants an exemption based on *exclusive use* to real property used as a church residence. Id. at § 11.20(a)(3).

Notwithstanding our state's consistent historical support of tax exemptions for religious organizations, the dissent displays a hostile attitude toward the tax exemption at issue in this case. The dissent's unforgivingly narrow construction of the word "use," demands that "use" of a parking space can mean only that the space be actually occupied for religious purposes. Such a construction would surely result in loss of an exemption for almost every church facility in the state. For no church actually occupies its real property twenty-four hours a day, either for strictly religious or any other purpose. Every church sanctuary, every adjoining church building, and every church parking lot are vacant many hours during the week.

Are we really to say that these facilities should lose their exemptions because they are not actually used for religious purposes most of the hours of the day? Are we really to demand that church parking spaces be actually occupied for religious purposes most of the time. That kind of thinking would demand that the church in this case either pay taxes or resort to extraordinary measures to insure that each

parking space be not only reserved, but actually used for church purposes only. I have an image of the church fencing the lot to prevent unauthorized use by the work force of a congested downtown area. And I can see tax appraisers standing over a set of parking spaces, calculating the number of hours each space is occupied for religious purposes, commercial purposes, or not used at all. Surely we must reject any statutory interpretation which logically concludes in such impractical demands.

I believe it far more sensible to follow the approach of our court in today's opinion. In it, we echo the logic and the sentiments of the Florida Supreme Court in a case remarkably similar to the one we now face. Central Baptist Church of Miami Florida, Inc. v. Dade County, 216 So.2d 4 (Fla. 1968). In Central Baptist Church, the court explained that the church owned an entire city block in downtown Miami. A large part of the church facility was devoted to parking. Some parking spaces were reserved at all times for church personnel, and all parking dedicated for use by church members during the evenings and on Sundays. During weekday business hours, the rest of the parking area was rented out as a commercial parking lot. The net income from the lot was devoted by the church to its world missions and its education program.

The controlling Florida statute in Central Baptist Church was consistent with the State constitution in providing for tax exemptions for "houses of public worship." Id. at 5. The statute expressly prohibited exemptions for "any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship.... " Id. at 5-6. These facilities, continued the statute, "shall be taxed the same as any other property." Id. at 6. The court focused on use in interpreting the statute, deciding that it granted a general statutory exemption of property "used for church or religious purposes." Id.

In deciding how the statute should affect the peculiar problem of the downtown church, the court asked what the legislature tried to

do when drafting the statute. The court focused on the limited nature of the rental and on the fact that the portion of the lot rented did not place that portion beyond the regular and customary church use. Id. The court distinguished between the situation presented by the case and hypothetical situation where church property might be held by private persons for speculative purposes or rented for a nonworship or nonschool purpose. These situations would represent significant diversions from church use and would justify loss of the exemption. "However," stated the court, "lesser and more limited divergent uses of church property are apparently not deemed by the Legislature sufficiently inconsistent with church purposes to lift the exemption, provided the funds derived from such uses are not diverted to purposes not contemplated by [the constitution]." Id. The court added:

> [T]he limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a sufficiently divergent commercial use that eliminate the exemption as to the commercial parking lot portion of the property. Id.[1]

---

[1]The statute which this opinion construes is no longer in existence. The statute was altered by the Florida legislature after litigants challenged the statute in a lawsuit based on federal constitutional grounds. The statute was never stricken by the federal courts. In fact, the statute's constitutionality was sustained in federal district court. See generally Diffenderfer v. Central Baptist Church of Miami, Fla. Inc., 316 F. Supp. 1116 (S.D. Fla. 1970), vacated as moot, 404 U.S. 412 (1972). The suit was awaiting decision by the United States Supreme Court when the legislature made the change. That Court remanded the case to the district court so the litigants could amend their pleadings to attack the new statute. 404 U.S. at 572.

The Florida Supreme Court's Central Baptist Church opinion construes the law of Florida as it existed at the time and, to that extent, the opinion remains good law. Our current statute is similar to the old Florida statute. The facts we face today bear a remarkable resemblance to those the Florida court faced. And, like that court, we face no federal constitutional challenge. The thoughtful reasoning of the Florida Supreme Court helps understand the particular problems facing us as we consider the meaning of our own statute and the facts of our own case.

I wish to suggest why the people of our state have insisted, in both constitution and statute, on granting tax exemptions to churches such as the one in this case. Churches, and downtown churches in particular, do something more than occupy valuable downtown real estate. Downtown churches offer a source of calm and hope to the frenzied workers of the commercial district. They often serve the poor and the homeless of poverty stricken downtown areas, providing shelter, food for the hungry, and counseling. Downtown churches are often beautiful to behold. They uplift. They are frequently ancient, serving as historical reminders of the courage which sustained our forebears as they constructed our cities. For the services they provide, these churches do not charge the public, nor do they make a profit. Instead, they dedicate all funds into the church and its work.

For many years, these factors have contributed to the public's decision to spare churches from the burden of taxation. It is not unreasonable for us, given the people's preference, to offer this downtown church every opportunity to prove that it complied with the terms of the statute and is entitled to the exemption.

Accordingly, I concur in the judgment of the court.

/S/

Eugene A. Cook

Justice

OPINION DELIVERED: June 10, 1992